
Summary Sheet

Meeting dates: February 2, 2018 Commission Conference Call

Agenda item: Washington Citizen Sportsmen and Twin Harbors Fish & Wildlife Advocacy Petition for rule-making to convert the Fish and Wildlife Commission North of Falcon (C-3608) into "rule"

Presenter(s): Ron Warren, Assistant Director, Fish Program
Michael Grossmann, Senior Counsel, Attorney General

Background summary: On December 21, 2017, two groups - Washington Citizen Sportsmen and Twin Harbors Fish and Wildlife Advocacy - submitted a joint petition for rule making. The petition requests that the Commission take action to adopt its current North of Falcon Policy (C-3608) as a formal rule. That would be undertaken utilizing the rule-making procedures of the Administrative Procedures Act (APA). The petition, (attached), outlines its objectives.

In summary, the petition focuses on the Commission's expressed desire, in the North of Falcon (NOF) policy (attached), for staff to work on enhancing transparency as part of the NOF negotiating process. Petitioners assert that staff have not done a good job of carrying out the Commission's policies on transparency in relation to NOF negotiations and co-manager planning. Petitioners' views on that point are summed up in these two assertions: "Simply put, we cannot find any documented effort by the Department to provide transparency over the co-management process. Our two groups believe it is time for the Commission to insert itself in a clear and precise fashion that would hopefully result in the appropriate level of consideration by the Department."

Petitioners believe that converting the NOF Policy into a rule utilizing the APA processes will help inform and involve the public with regard to transparency and the NOF process.

At this time, petitioners do not propose specific changes to the NOF process, but would instead use the rule-making process to engage the Commission on whether new aspects to the NOF process should be considered and adopted in any final rule.

Policy issue(s) you are bringing to the Commission for consideration:

Pursuant to RCW 34.05.330, should the Commission:

- a) Deny the petition in writing, stating the reasons for the denial, specifically addressing the concerns raised by the petitioner, and where appropriate, the alternative means by which it will address the concerns raised by the petitioner; or
- b) Initiate rule-making to convert the North of Falcon Policy (C-3608) into a "rule" using APA rule-making procedures?

Fiscal impacts of agency implementation:

None

Public involvement process used and what you learned:

The Fish and Wildlife Commission has received this petition requesting the North of Falcon Policy (C-3608) be converted into a "rule" using APA rule-making procedures.

Action requested:

Department staff recommend that the Fish and Wildlife Commission deny the petition to convert the Fish and Wildlife Commission North of Falcon (C-3608) into rule.

Draft motion language:

Motion: I move to deny the petition as presented by staff

Is there a “second”?

If so, then motion maker discusses basis for motion; other Commissioners discuss views on motion; amendments, if any, proposed and addressed.

Justification for Commission action:

Commission Policy is internal WDFW guidance – The Department consists of the Commission, the Director, and agency staff. By statute, the Commission sets policy for the Department. Formal Commission policies are a written form of that policy guidance, and an appropriate method for the Commission to provide internal policy guidance to the Director/staff. The North of Falcon (NoF) policy is an expression of the Commission’s aspirations, goals and guidelines that the Department staff use to transact the business of the agency in relation to establishing co-manager salmon fishing seasons.

Commission policies provide strong direction, but are also flexible. While Commission policies are designed to provide a presumptive path regarding the Department’s management activities, they are also somewhat flexible so that Department staff may address specific factual situations. For example, the NoF policy delegates authority to the Director/staff to negotiate annual fishing plans, and adopt corresponding fishery rules. Part of that delegation includes the authority to adopt in-season adjustments to these fisheries. Implementing that delegated authority requires the Director/staff to consider the broad objectives set forth in the policy within the context of season-specific facts that develop, sometimes very rapidly.

The NoF policy does not meet the statutory definition of a rule because it is internal direction to staff rather than an order or directive of general applicability to the public; instead it provides discretion to staff to address factual situations as they arise when making agreements with Tribes, or when adopting formal rules to open state fisheries. Further, the NoF policy, like other salmon management policies, provides the staff discretion to address changing and unforeseen circumstances. The structure and purpose of Commission policies – to act as internal agency guidance and to facilitate some discretion in applying policy guidance without additional formal procedures - are inconsistent with the statutory definition of an enforceable “rule” as that term is used in the Administrative Procedures Act.

The Commission uses an extensive, transparent, and public involvement process in developing and periodically reviewing policies – Petitioners correctly observe that the rule-making process can provide opportunities to inform and involve the public about an agency’s practices. In that regard, the Commission’s policy formulation process already meets or exceeds those objectives. Recent examples of Commission policy development show the Commission uses a more extensive public involvement process

to develop policies than the APA rule making. When adopting rules, the Commission typically uses a two-public-meeting approach, the first public meeting for an overall briefing, including a discussion of the proposed rule, review of written comments, and then an open, public, oral hearing. The Commission usually takes action adopting, amending, or otherwise continuing to work on the proposal, at its next regular public meeting. When adopting policies, the Commission and Department staff have used a much longer and more extensive public outreach process (e.g., Grays Harbor Basin Salmon Management Policy C3621, and Willapa Bay Salmon Management Policy C3622 – briefing excerpts attached). The Commission also requires periodic, often annual review of policy implementation through an open, transparent public process. In addition, when extensive policy changes are proposed, it typically involves a multi-meeting open public discussion before Commission action amending the NoF policy.

Adopting the NoF policy as a rule may lead to confusion as to whether it is a statutorily defined rule or a non-enforceable advisory rule. The term “rule” is defined in the APA and the NoF policy does not meet the definition of a “rule” because its purpose is different – internal agency guidance rather than an order or directive of general applicability to the public that affects defined public rights and/or responsibilities. However, adopting the NoF policy as a rule may lead people to think that it is a traditional rule, and therefore subject to regulatory enforcement action and/or litigation by third parties. It is not in the public’s or Department’s interest to have confusion as to whether the NoF policy is something that is enforceable as a formal rule, or the basis for litigation, if outside disputes rise as to the policy’s implementation. Ultimately, the Commission’s NoF policy is direction from the Commission to the Director and staff. In that regard, the Commission, as policy lead for WDFW, already has the necessary tools to review and adjust the Department’s implementation of the NoF policy. The Commission has the sole authority to take corrective action if it feels the NoF policy is not being implemented properly, and can also amend the policy if it has questions or concerns. Indeed, the NoF policy is typically reviewed and amended annually in the course of public dialogue with staff about its implementation.

Lastly, adopting the NoF policy as a rule will not achieve an underlying desire that petitioners have communicated separately to the Director, staff, and individual Commission members - to mandate that every aspect of NoF negotiations with the Puget Sound Treaty Tribes and NOAA be open to the public. Even if the NoF policy could be adopted as an enforceable state law rule, it would not independently bind either the individually sovereign Treaty Tribe governments (letter from NWIFC Chairperson Lorraine Loomis attached), or NOAA. A state citizen lawsuit purporting to seek enforcement of the NoF rule cannot compel action by those other governments. Accordingly, a mandate imposing broad and unilateral negotiating terms could hamper the Department’s ability to work with co-managers and NOAA. Furthermore, the absence of an enforceable rule does not preclude the Department from continuing to work with co-managers on increased transparency, including the implementation of reasonable agency transparency measures on its own when the agency participates on NoF negotiations (e.g. communicating to citizen advisory groups, as negotiations are underway). See attached public schedule for NoF.

Post decision communications plan:

Commission staff will provide a letter to the petitioners with the final outcome of the Commission decision regarding the petition.
